STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

Ice Lounge, Inc. d/b/a Ice Lounge, Appellant,	:	
v.	:	**DBR No.: 15LQ008**
The City of Providence Board of Licenses, Appellee.	:	

DECISION

I. INTRODUCTION

On or about May 28, 2015, the Providence Board of Licenses ("Board") notified Ice Lounge, Inc. d/b/a Ice Lounge ("Appellant" or "Ice") that its Class BVX liquor (extended) license located at 334 Atwells Avenue, Providence, Rhode Island had been revoked and imposed a three (3) day suspension on its Class BV license and imposed an administrative penalty of $1,500. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision to the Director of the Department of Business Regulation ("Department"). The Administrative penalty is appealed pursuant to R.I. Gen. Laws § 3-5-21. A partial and conditional stay of the Board's order was issued on June 3 and June 24, 2015 by the Department. Pursuant to R.I. Gen. Laws § 3-7-21(c), the parties agreed to base the appeal on the record before the Board. Oral closings were held on June 16, 2015 before the undersigned sitting as a designee of the Director.[1]

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

[1] The transcript was received on July 1, 2015.

III. ISSUES

Whether to uphold or overturn the Board's decision regarding the Appellant.

IV. MATERIAL FACTS AND TESTIMONY

At the hearing before the Board, Sergeant David Tejada ("Tejada") of the Providence Police Department testified on behalf of the Board. He testified that on the evening of April 18, 2015, there were complaints of loud music at Ice so he responded and he could hear the loud music coming from the direction of Ice. He testified that Ice is on the second floor of the building with a restaurant downstairs. He testified that they (he and his partner) had to determine where the music was coming from so they entered the restaurant which was playing music but it was not the music that could be heard outside. He testified that they had information that Ice had a disc jockey ("DJ"). He testified they went into the basement and there was a locked storage area so they tried to get into Ice but no one was around so they went back to the basement and saw someone open a door and found a closet where there was a man with DJ equipment and headphones. He testified they asked the man who he was DJ'ing for and the man said he was not DJ'ing but was live streaming and recording. Tejada testified that the man's video monitor had different shots from several different cameras and it was a live video and he could tell it was of Ice because he has been inside Ice. He testified that the music coming from the man was the same music as being played in Ice. He testified that Detective Kramer took photographs of the DJ, the equipment, microphone, and headphones.

On cross-examination, Tejada testified that he responded at about 1:10 a.m. which is close to closing time (the parties stipulated that it was a Friday into Saturday morning). He testified he never read any relevant lease and does not know who has access to the basement. He testified he did not speak to anyone from Ice that night because nobody answered the door. He

testified that he did not see anyone charge a cover charge at Ice. On redirect examination, he testified that the music from the DJ was the same music that he heard from Ice.

Detective Patrick Kramer testified on behalf of the Board. He testified he took the photographs that were entered as Exhibit A and showed the DJ and equipment. See Exhibit A from the Board hearing (photographs of DJ, sound equipment, video monitors). On cross-examination, he testified that Tejada prepared the report and he did not speak to the DJ but was there when the man said he was not DJ'ing for Ice but was live streaming and recording. He testified that he did not see anyone enter Ice or pay a cover charge.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Arguments

The Board argued that the evidence was that there was loud music that night and the police eliminated other sources of the music except for Ice. The Board argued that based on the evidence of the man in the basement playing music and the video monitor showing the interior of Ice and DJ equipment that the man was clearly DJ'ing for Ice. The Board pointed out that the February Department's Ice decision required that Ice comply with local licensing requirements and not have unlicensed entertainment. The Board argued that the sanctions imposed were to make Ice a responsible business. The Board argued that R.I. Gen. Laws § 5-22-4 indicates no one can receive any monetary benefit from having a show so the issue of promotion or a cover charge is not relevant. Finally, the Board argued that the noise is a public safety threat because Ice is not following the laws and no one from Ice testified that it did not control or hire the DJ.

The Appellant argued that revoking its extended license is really a backdoor way to revoking the entire license as the Board is aware that Ice is a late night business. Ice argued that no one spoke to Ice about the DJ and there was no evidence regarding who had access to the building's basement. The Board argued that music that is incidental to a business is allowed and there was no evidence of Ice offering entertainment for additional profit.

C. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function).

Thus, while there was not a new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Thus, this appeal is not bound by the Board's reasons for revocation or suspension but whether the Board presented its case for revocation or suspension before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said revocation and suspension.

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application unwarranted in law but excessive variance would be evidence that an action was arbitrary and capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's* 2002 WL 977812 (R.I. Super.) (overturning revocation as arbitrary and capricious).

An appeal proceeding held pursuant to R.I. Gen. Laws § 3-7-21 is considered a civil proceeding. See *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I.

1983). In civil proceedings, unless otherwise specified, the burden of proof generally needed for moving parties to prevail is a fair preponderance of the evidence. *Jackson Furniture Co. v Lieberman*, 14 A.2d 27 (R.I. 1940). See also *Parenti v. McConaghy*, 2006 WL 1314255 (R.I.Super.); and *Manny's Café, Inc. v. Tiverton Board of Commissioners*, LCA TI-97-16 (11/10/97) (Department decision discusses burden of proof for proceedings held pursuant to R.I. Gen. Laws § 3-7-21).

D. Sanctions Prior to May 28, 2015

The License was issued on July 16, 2009. On November 28, 2011, an administrative penalty of $1,500 was imposed for violating a cease and desist order and having entertainment without a license. On October 3, 2011, a penalty of $2,500 was imposed for various violations including entertainment without a license and violating conditions of licensing. On August 17, 2011, a penalty of $500 was imposed for violating the hours of operation. On April 27, 2011, a penalty of $250 was imposed and a warning issued for having an entertainment without a license. On July 9, 2014, a penalty of $2,400 was imposed for 16 counts of permitting smoking in a public place. On February 27, 2015, a 30 day suspension was imposed for disorderly conduct (a fight though no injuries or weapons) and 19 stipulated violations (e.g. public smoking, entertainment without license, etc.).

E. The Extended License

R.I. Gen. Laws § 3-7-7[2] provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights.

[2] R.I. Gen. Laws § 3-7-7 states in part as follows:

> Class B license. – (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town

In *28 Prospect Hill Street, Inc. v. Gaines*, 461 A.2d 923 (R.I. 1983), the Court found that a city or town may enact a blanket prohibition of a 2:00 a.m. closing time applicable to all Class B licensees and such a blanket prohibition would not trigger any due process concerns. However, there is a distinction between allowing a blanket prohibition of 2:00 a.m. closing times for all Class B licenses *and* a city or town decision/sanction concerning an individual license holder based on reasons or allegations raised by local officials. While the Board argued at the stay hearing that the Department did not have jurisdiction over the 2:00 a.m. closing revocation as that was a question of hours of operation, that argument previously has been rejected by the Department. In *Joseph's Pub v. Smithfield Appeal Board of License Commissioners*, LCA-SM-97-06 (8/21/97), p. 9, the Department found "[c]ontrary to the Town's position, due process rights or protections are due an individual licensee when faced with a city of town decision to suspend, revoke or sanction on that licensee's 2:00 a.m. closing authorization." In other words, a town may prohibit all 2:00 a.m. closings but an individual revocation has the right to a hearing and appeal. *Joseph's Pub* related to the revocation of a 2:00 a.m. license closing hour and the standard of review for a revocation or suspension of license is "for cause."

F. Whether Appellant Violated the Liquor Licensing Statute

The evidence was that a man in the basement was playing music and watching video of Ice on a monitor. The evidence was that the music from the man in the basement was the same music coming from Ice. The Appellant raised the issue that the DJ denied to the police that he

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council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder.

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(4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars ($200) to five hundred dollars ($500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

was working for Ice. That is irrelevant in that the evidence was the music he was playing was the music coming from Ice. Whether Ice had access to the basement in its lease was irrelevant since that would not be dispositive of whether someone employed or working for Ice accessed the basement or not (e.g. some people might ignore the lease). While the police did not speak to anyone from Ice, no one from Ice testified at the hearing to dispute the evidence presented by the police officers. That evidence was that a man playing music in the basement was watching video of the inside of Ice and the music the man was playing was the same music as heard in Ice. The only inference and conclusion to make is that the man was DJ'ing for Ice and playing the loud music heard outside by the police.

The Board found that the Appellant violated R.I. Gen. Laws § 3-5-21 as the result of violating R.I. Gen. Laws § 5-22-4. The Appellant argued that it could not have violated R.I. Gen. Laws § 5-22-4[3] because it was not profiting from the DJ. The Board argued that pursuant to said statute the Appellant did not need to promote or charge a cover for entertainment but rather just needed to profit in general by offering entertainment. The Appellant relied on *Chernov Enterprises, Inc. v. Scuncio*, 268 A.2d 424 (R.I. 1970) to argue that incidental entertainment is allowed without needing a permit. *Chernov* was interpreted R.I. Gen. Laws § 3-7-7 which prohibits Class B licensees from having dances without proper permits. *Chernov* found that R.I. Gen. Laws § 3-7-7 did not apply to incidental entertainment for patrons for which no separate charge was made, but that it did apply to the holding of dances for which there is a separate

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[3] R.I. Gen. Laws § 5-22-4 provides as follows

> Town or city license required. – No person shall publicly or for pay, or for any profit or advantage to himself or herself, exhibit or promote or take part in any theatrical performance, or rope or wire dancing or other show or performance, or conduct, engage in or promote any wrestling, boxing, or sparring match or exhibition, nor shall any person for any pecuniary profit or advantage to himself or herself, promote any public roller skating in rinks or halls, or give any dance or ball, without a license from the town or city council of the town or city in which that performance, show, exhibition, dance, or ball is sought to be given.

(The Board's decision had a typographical error and referred to this statute as R.I. Gen. Laws § 3-22-4.

charge. Subsequent to *Chernov*, R.I. Gen. Laws § 3-7-7.3 was enacted. The Superior Court in *Casa Di Mario Inc. v. Richardson*, 1998 WL 799146 found that R.I. Gen. Laws § 3-7-7.3 arguably abrogated *Chernov* as it allows cities or towns to regulate entertainment.[4] In the end, the actual interpretation of the entertainment statute is not relevant since Ice had been admonished by the Department that it could not have unlicensed entertainment *In the Matter of Ice Lounge, Inc. d/b/a Ice Lounge v. City of Providence, Board of Licenses*, DBR No. 14LQ064 (2/27/15). Having a DJ in the basement is certainly a violation of the expectations and conditions set forth in the Department's decision regarding entertainment.

R.I. Gen. Laws § 3-5-21 states in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license. – (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

R.I. Gen. Laws § 3-5-23 states in part as follows:

> (b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood . . . he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

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[4] At the time of *Casa Di Maria*, there was a different version of R.I. Gen. Laws § 3-7-7.3, but the current version is as follows:

> Class B licenses – Restriction on entertainment. – Notwithstanding any provision of this chapter or in the Rhode Island general laws to the contrary, in the case of any city or town which issues any retailer's Class B license this city or town may restrict or prohibit entertainment at these licensed facilities, in accordance with objective standards adopted by the municipality and approved by the department of business regulation, provided that any standard shall be applied uniformly to all of these licensed facilities.

Cesaroni found that "disorderly" as contemplated in R.I. Gen. Laws § 3-5-23 means as follows:

> The word "disorderly" as used here contemplates conduct within premises where liquor is dispensed under a license that causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof. *Cesaroni* at 296.

While the Board did not find the Appellant is in violation of R.I. Gen. Laws § 3-5-23, case law has found that R.I. Gen. Laws § 3-5-23 prohibits a liquor licensee from causing either directly or indirectly an annoyance in the neighborhood. Playing loud music is certainly an annoyance to the neighborhood. Thus, the Appellant is in violation of R.I. Gen. Laws § 3-5-23 by the playing of the loud music and causing an annoyance and disturbance in the neighborhood. Additionally, the Appellant violated R.I. Gen. Laws § 3-5-21 (violated condition of licensing).

G. When a Suspension or Revocation of License is Justified

A liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859, 859 (R.I. 1980). A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent violation. While such a responsibility may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841 (R.I. 1966). See also *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

In revoking a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni* at 295-296 as follows:

> [T]he legislature, in enacting the pertinent provision of the statute, intended to impose upon such licensee the obligation to maintain an efficient and affirmative supervision over the conduct of his patrons in his place to such an extent as is necessary to maintain order therein. It is our opinion that as a practical matter a licensee assumes an obligation to affirmatively supervise the conduct of his patrons so as to preclude the generation therefrom of conditions in the neighborhood of like character to conditions that would result from maintenance of a nuisance therein.
>
> It is to be conceded that this imposes upon a licensee an onerous burden in the management of the licensed premises. It is, however, within the authority of the legislature, the liquor traffic being peculiarly within the police power of the state.

Nonetheless, the revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and a shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy,* 2003 WL 1880122 (R.I. Super.) (upholding revocation of license when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline.[5] However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra.*

[5] Progressive discipline relies on the sanctions imposed on a licensee by a licensing authority.

H. What Sanction is Justified

The sanctions imposed for R.I. Gen. Laws § 3-5-23 vary depending on the type of disorderly conduct. Very serious and egregious violations that involve weapons and/or serious assaults could result in a revocation of license. E.g. *Cardio Enterprises* (license revoked for shooting that arose at bar). A long suspension may be imposed for severe disorderly conduct. E.g. *Gabby's* (30 day suspension for severe disorderly conduct but not so severe as to merit revocation). In *JJAM Sports, Inc. d/b/a LaCabana Night Club Sports Bar and Grille, Inc. v. Lincoln Board of License Commissioners*, LCA-LI-99-05 (12/27/99), the Department uphold a two (2) day suspension for a fight inside the bar and a second fight outside in the parking lot with the patrons refusing to leave and police (including from the adjoining community) being called to clear the patrons and a police officer had a beer bottle thrown at him. More recently, *DL Enterprises d/b/a East Bay Tavern v. East Providence City Council*, DBR No. 14LQ009 (4/28/14), the Department reduced revocation to a 14 day suspension for fighting inside bar where there was allegations of stabbing but no positive identification of a weapon.

In this matter, the Appellant has previously been suspended for disorderly conduct and other violations such as entertainment without a license and public smoking. In this situation, progressive discipline for one (1) disorderly incident (not egregious; no violence) would require something less than a revocation of the BX (extended) license. However, the Department is mindful of the fact that Ice was hiding a DJ in the basement. This was not a situation where its ambient background music was turned up too loud. Rather the Appellant tried to have DJ entertainment on the sly. However, in looking at the totality of the situation and applying progressive discipline, it is not appropriate to revoke the Class BX license. Instead, in terms of

applying the Board's goal – ensuring the Appellant is a responsible licensee - it is appropriate to impose conditions[6] of licensing and increase the suspension of the whole license.[7]

I. Administrative Penalties

The Appellant raised the issue of the administrative penalties imposed by the Board. Pursuant to R.I. Gen. Laws § 3-7-21, the Department does not have authority to hear appeals of fines. However, the Superior Court found that the Department has implied jurisdiction to review administrative fines imposed by local boards pursuant to R.I. Gen. Laws § 3-5-21. See *The Rack, Inc. d/b/a Smoke v. Providence Board of Licenses*, et al. CA No. PC 2011-5909 (7/22/13). The Court found that the Department did not have to apply a *de novo* standard of review to appeals of administrative fines but that the Department must review the record and articulate and document a substantial, non-arbitrary rationale for invoking its discretion to dismiss appeals of fines imposed by local licensing boards and that the exercise of such discretion must be reasonable. The Court further found that if the monetary fine imposed on a licensee by a local liquor licensing board is within statewide limits set by statute then such a finding by the Department may be sufficient basis for the Department to dismiss a licensee's appeal. *Id.* at pp. 14-17.

R.I. Gen. Laws § 3-5-21(b) provides that a first offense by a liquor licensee shall be fined $500 with the fine for each subsequent offence not to exceed $1,000. R.I. Gen. Laws § 3-5-21 establishes minimum fines for violations. Thus, the first offense is for any offense of the liquor licensing law and the subsequent offense is for any subsequent offense of the liquor licensing laws rather than pinpointing whether the violation is the first or subsequent offence of a specific statutory or regulatory violation. This interpretation is supported by the fact that the statute provides for a

[6] Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. See *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/8/10).

[7] The whole license refers to the BV license and the extended hours license so is a Class BVX.

clean slate for all offenses if the licensee has not had any offenses for three (3) years. In other words, the first offense of the liquor statute cannot be fined more than $500 with each subsequent offense of the liquor licensing law not being fined more than $1,000 but if the licensee has no offenses for three (3) years, the clock is re-set and any violation would be considered a first offense.

The Appellant had administrative penalties imposed within three (3) years prior to this violation so that an administrative penalty of $1,000 per violation is appropriate. In this matter, the Appellant has violated R.I. Gen. Laws § 3-5-21 (violate conditions of licensing) and R.I. Gen. Laws § 3-5-23 (disorderly). Therefore, the administrative penalty of $1,500 is upheld as being within the statutory mandates for penalties.

V. FINDINGS OF FACT

1. On or about May 28, 2015, the Board notified the Appellant that its Class BVX (extended) liquor license had been revoked and imposed a three (3) day suspension on its Class BV license and imposed an administrative penalty of $1,500.

2. Pursuant to R.I. Gen. Laws § 3-7-21 and R.I. Gen. Laws § 3-5-21, the Appellant appealed this decision to the Director of the Department.

3. A partial and conditional stay of the Board's sanctions was issued on June 3 and June 24, 2015 by the Department.

4. Pursuant to R.I. Gen. Laws § 3-7-21(c), the parties agreed to base the appeal on the record before the Board.

5. Oral closings were held on June 16, 2015.

6. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. In this *de novo* hearing, there was no showing by the Board to support the revocation of the Class BX license. Instead, the violations warrant a longer suspension of the Class BVX license and the imposition of the conditions set for the below.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board be modified to the following:

1. The class BVX license is suspended for ten (10) days beginning on the 31st day after the execution of this decision.

2. The $1,500 administrative penalty is upheld.

3. The Appellant's music does not go over 50 dB[8] and the back speaker by the alley continues to be disconnected from the music source

[8] The undersigned based this condition on Article III of Providence Ordinance Code Section 16-93 which states as follows:

> Radios, television sets, and similar devices.
>
> It shall be unlawful for any person within any residential zone of the city to use or operate any radio receiving set, musical instrument, phonograph, television set, or other machine or device for the producing or reproducing of sound in such a manner as to disturb the peace, quiet and comfort of neighborhood residents or of any reasonable person of normal sensitivity residing in the area. The operation of any such set, instrument, phonograph, machine or device so as to exceed fifty (50) dBA between the hours of 8:00 p.m. and 7:00 a.m. or so as to exceed fifty-five (55) dBA between the hours of 7:00 a.m. and 8:00 p.m. measured at the property line of the building, structure or vehicle in which it is located, or at any hour when the same is audible to a person of reasonably sensitive hearing at a distance of two hundred (200) feet from its source, shall be prima facie evidence of a violation of this section.

While Atwells Avenue is a mixed area and not completely residential, this provides a baseline for ensuring the music stays ambient. See *La Base Sports Bar & Grill LLC v. City of Providence, Board of Licenses,* DBR No.: 10-L-0037 (4/5/11).

4. The two (2) person police detail on Friday and Saturday nights is continued for 30 days from the execution of this decision with the Board to conduct a review after 30 days to determine whether the detail shall continue.

Dated: July 17, 2015

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

_____ ADOPT
_____ REJECT
__✓__ MODIFY (see attached)

Dated: 7/22/15

Macky McCleary
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION

The Director hereby modifies the recommended Decision by deleting Subsection VII(2) and Section VIII and replacing such Subsection VII(2) and Section VIII with the following:

2. In this *de novo* hearing, there was a sufficient showing by the Board to support the revocation of the Class BVX license and imposition of an administrative penalty. As in the *Pakse* case, there have been repeated violations by the Appellant during the last four years, including entertainment without a license, public smoking and disorderly conduct. The progressive discipline that has been imposed for these violations has not effected a change in the Appellant's unlawful conduct. In addition, what appears to be the Appellant's willful obfuscation of its unlawful behavior confirms Appellant's intention not to comply with the laws governing the operation of its business.

VIII.

Based upon the foregoing, the Board's decision revoking the Appellant's Class BVX license and imposing a $1,500 administrative penalty is hereby affirmed.

CERTIFICATION

I hereby certify on this 22nd day of July, 2015 that a copy of the within Decision was sent by first class mail, postage prepaid to Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.